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<b>L.D., claiming as widow of A.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 06-975</b>
	)	<b>Issued: October 3, 2006</b>
	)	
<b>DEPARTMENT OF THE NAVY, MILITARY</b>	)	
<b>SEALIFT COMMAND, Virginia Beach, VA,</b>	)	
<b>Employer</b>	)	
	)	

*Case Submitted on the Record*

*Office of Solicitor, for the Director*

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

On March 20, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 8, 2006, which denied a request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1). Because more than one year has elapsed between the last merit decision dated September 23, 2002 and the filing of this appeal on March 20, 2006, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

The issue on appeal is whether the Office properly denied appellant's request for an oral hearing.

### **FACTUAL HISTORY**

On December 28, 2000 the employee, then a 63-year-old engine utility man, filed an occupational disease claim alleging that he developed pneumoconiosis, asbestosis and cancer while in the performance of duty. He retired in October 1976.

The employee died on January 24, 2001 due to metastatic colon cancer. After the employee's death, the claim was accepted for pleural plaques due to asbestos exposure.

On February 15, 2001 appellant filed a claim for compensation by widow (Form CA-5) alleging that the employee's death was causally related to his employment.

Appellant submitted a report from Dr. Samuel P. Hammer, a Board-certified internist, dated December 11, 2001, who diagnosed pathologic asbestosis and round atelectasis. Dr. Hammer opined to a reasonable degree of medical certainty that based on the pathological asbestosis and elevated numbers of asbestos bodies in the four of the five lobes examined the employee's exposure to asbestos was great enough to be causally related to his metastatic colon cancer, which was the cause of his death.

The employee's records were reviewed by the Office medical adviser, who opined in a report dated April 22, 2002, that the evidence was insufficient to make a firm correlation between asbestos exposure and the subsequent colon cancer and concluded that the employee's metastatic colon cancer was unrelated to his exposure to asbestos.

On June 25, 2002 the Office found that a conflict of medical opinion existed between Dr. Hammer, the employee's physician and the Office medical adviser.

To resolve the conflict the Office referred the employee's medical records to a referee physician, Dr. Kenneth C. Lamb, a Board-certified internist, who indicated, in a report dated July 22, 2002, that he reviewed the records provided to him and opined that there was no causal relationship between the employee's asbestosis and colon cancer which caused his death.

In a decision dated September 23, 2002, the Office denied appellant's claim for death benefits on the grounds that the medical evidence was not sufficient to establish that the employee's death was not caused by his federal employment.

By letter dated October 8, 2005,<sup>1</sup> appellant requested an oral hearing before an Office hearing representative and submitted a duplicate report from Dr. Carolyn S. Ray, a Board-certified internist, dated September 7, 2000.

In a decision dated February 8, 2006, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. The Branch of Hearings and Review found that, since appellant's October 8, 2005 request for an oral hearing was not made within 30 days of the Office's September 23, 2002 decision, she was not entitled to an oral hearing as a matter

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<sup>1</sup> Appellant's letter is actually dated October 8, 2006; however, this is a typographical error as the document is date-stamped as received by the Office on October 20, 2005.

of right. Appellant was informed that the employee's case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence establishing that the employee's death was causally related to his asbestos exposure during his federal employment.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>2</sup> Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>3</sup> The Office's regulations provide that the request must be sent within 30 days of the date of the decision, for which a hearing is sought and also that "the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."<sup>4</sup>

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,<sup>5</sup> has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>6</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>7</sup>

### **ANALYSIS**

Appellant's request for an oral hearing dated October 8, 2005 was denied on the grounds that it was untimely as it was not made within 30 days of the September 23, 2002 decision. The Board finds that, because the request for an oral hearing was not made within 30 days of the Office's September 23, 2002 decision, she was not entitled, as a matter of right, to an oral hearing.

In its February 8, 2006 decision, the Office noted that, while appellant was not entitled to an oral hearing as a matter of right, it had considered the matter in relation to the issue involved and, under its discretionary authority, denied the request as appellant could pursue the employee's claim further by requesting reconsideration and submitting additional evidence in support of the

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> 20 C.F.R. § 10.615.

<sup>4</sup> 20 C.F.R. § 10.616(a).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>7</sup> *Teresa M. Valle*, 57 ECAB \_\_\_\_ (Docket No. 06-438, issued April 19, 2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

claim. The Board finds that the Office properly exercised its discretion by indicating that it had also denied appellant's hearing request on the basis that the case could be equally well addressed by requesting reconsideration and submitting additional medical evidence. There is no evidence of an abuse of discretion in this case.<sup>8</sup>

### **CONCLUSION**

The Board, therefore, finds that the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).<sup>9</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 8, 2006 is affirmed.

Issued: October 3, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> See *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>9</sup> With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).